

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BUILDING CODE DIVISION

In the Matter of the Appeal  
of Weber Barlow Stores, Inc.  
FACT,  
and Weis Builders, Inc. of  
the Final Decision of the  
City of Rochester

FINDINGS OF  
  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on April 8, 1987 at the Olmsted County Courthouse, Rochester, Minnesota and on April 10, 1987 at the Office of Administrative Hearings, 400 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The final post-hearing brief was filed on May 21, 1987, at which time the record was closed.

Steven K. Champlin, from the firm of Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, Minnesota 55402, appeared on behalf of the Appellants, Weber-Barlow Stores, Inc. and Weis Builders, Inc. Douglas J. Gregor, Assistant City Attorney, Room I City Hall, Rochester, Minnesota 55902, appeared on behalf of the Respondent, the City of Rochester

Notice is hereby given that, pursuant to Minn. Stat. 14 61 the final decision of the Commissioner of Administration shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Sandra J. Hale, Administration Building, 50 Sherburne Avenue, St. Paul, Minnesota 55155,

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether: (1) the Appellants failed to comply with the fire protection requirements contained in

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U.B.C. 1712,

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Weber Barlow Stores, Inc. ("Weber Barlow"), contracted in December of 1985 with Weis Builders, Inc. ("Weis Builders"), a general contractor operating out of Rochester, Minnesota to design and build a Cub Retail Center

within an existing building located at 1021-15th Avenue Southeast in Rochester.

2. The Cub Retail Center construction project included design and of a Cub Foods supermarket. Approximately 7,000 square feet of the Cub Foods supermarket floor space is occupied by freestanding cooler and freezer units.' The coolers and freezers (hereinafter only "coolers") are constructed with pre-manufactured insulation panels using a foam plastic material which has a flame-spread rating of 20 and a "smoke developed" rating

300. The foam plastic is sandwiched between two layers of corrosion-resistant stainless steel, each having a Lase thickness of 0.016 inches. The insulation panels are four inches thick, eight feet wide and 25 feet long. foam plastic material is considered a fire hazard because of its rapid fire spread, dense smoke and "off-gassing", the emission of toxic gasses during burning or disintegration.

3. Weis Builders submitted an application to the City of Rochester, building Code Division on February 13, 1986 for a building permit for the Cub Store construction project together with the plans and specifications for the work covered by the permit.

4. The plans and specifications provided to the City included a "footprint" of the areas where the coolers would be placed within the building and a cross-sectional detail of the area above the coolers identified with the phrase "cooler or freezer NIC" (not included in the contract). The sprinkler plans did not identify the location of the coolers and freezers, but could be cross-referenced by section numbers to the "footprint" plans.

5. On February 25, 1986 the Building Code Division issued the first in a series of inquiries with respect to the permit application. Weis Builders was requested to "address the requirements for a thermal barrier if foam plastic insulation is used in the coolers or freezers in accordance with the requirements of UBC, Section 1712 A and B." Weis Builders responded to the City's inquiry by letter dated March 10,, 1986 stating that "all freezers ply with the requirements of foam plastic insulation. All coolers are 'Pal laminated maintaining fire resistance."

6. The permit for the construction project was issued by the City of Rochester on March 26, 1986 without further correspondence between the parties in respect to the adequacy of the fire protection for the cooler units.

7. Weis Builders subcontracted with Olympic Fire Protection ("Olympic") to install the sprinkler system in the Cub Retail building. Olympic prepared and submitted sprinkler system plans and drawings to the City of Rochester,

building Code Division which were approved on July 24, 1986.

8. The City's approval stamp of the building permit plans and the sprinkler system plans indicates that the approval "should not be construed as . . . a determination by [the City] that these plans comply with all requirements of the Building or Fire Code. . . . The owner and his contracting agent are responsible for meeting all code requirements and should deviations subsequently be determined or discovered, the owner and the contracting agent will be required to make necessary corrections or additions." Additionally,

'A small portion of the 7,000 square feet of cooler and freezer space is not at issue in this proceeding.

in a letter dated July 24, 1986 from the City Fire Prevention Bureau to Olympic, the City stated that final approval of the sprinkler system was subject to an on-site inspection.

9. On or about September 17, 1986, and approximately two weeks before the opening of the Cub Retail Center, the City made its final inspection of the building. At that time, the Building Inspector for the Fire Prevention Bureau of the City of Rochester indicated to Weis Builders representatives that the building construction violated the requirements of U.B.C. 1712 (a) and (b) because the area immediately above the coolers on the west side of the building was not sprinklered. All other areas of the store were covered by an automatic sprinklering system, as was the interior of all the coolers. However, the area immediately above the coolers on the west side of the building below the second floor was not covered.

10. The cooler units are located along approximately 225 feet of the west side of the Cub Foods supermarket. Along the east wall of the supermarket are a number of exit/entrances into the Cub Center main retail area. In the middle of the supermarket is a twenty-foot wide corridor leading to an outside exit. On the north end is a stairway to the floor above which contains an office area.

11. The area between the top of the coolers and the first floor ceiling (the floor of the second story) is a space approximately 22 inches in height. The masonry exterior walls of the building form the back side of the space. The top surface of the coolers form the floor of the space and are separated from the back masonry walls by approximately 6 - 10 inches of space. The ceiling of the space is the metal decking and two-inch concrete floor of the building's second story. Between the ceiling and floor of the space are steel trusses, approximately 6 inches from the surface of the coolers. Also within this area are various utility lines and two sprinkler water supply lines running the length of the cooler units which supply water to the sprinkler heads which extend down into the coolers themselves. Subsequent to the Notice

of Violation dated September 26, 1986, the Appellants affixed 5/8-inch thick gypsum board vertically at the front of the space from the top of the coolers and reaching to the concrete floor above, Pipes and metal beams run through the gypsum board and an access door has been cut.

12. Weis Builders responded to the City by letter dated September 17, 1986, contesting the need for sprinkler protection in the area above the coolers. The City of Rochester issued a violation notice to Weis Builders on September 26, 1986 and again on January 23, 1987 because of the continued failure to provide sprinkler protection in the area above the coolers.

13. Appellants estimate that the cost of installing sprinkler heads or a thermal barrier which would comply with U.B.C. 1712 in the area above the coolers would be approximately \$11,000. The total value of the construction project as estimated on the permit application was \$1,000,000.

14. Three construction projects in the metropolitan area which Weis Builders has worked on have pre-manufactured cooler units installed with a small space between the tops of the coolers and the second floor of the buildings. These spaces have not been required to be sprinklered by the local inspectors (Maplewood, Eden Prairie and Brooklyn Park). However, the municipalities of Austin and Albert Lea require that sprinklers be installed above all coolers which are manufactured with foam insulation.

15. Weis Builders appealed the alleged violation to the Rochester building Code Division Board of Appeals which resulted in a hearing on October 7, 1986. On October 9, 1986, the Board of Appeals notified Weis Builders that the violation notice would be withdrawn, concluding that the --ea in question was not required to be protected by a sprinkler system however, on November 7, 1986, the Board of Appeals sent a notice to Weis builders that it had reversed its ruling on this issue and that the violation notice would be upheld. On December 3, 1986, Weis Builders and Heber Barlow appealed this decision to the Commissioner of Administration pursuant to Minn. stat. 16B.67.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Department of Administration have jurisdiction over this matter pursuant to Minn. Stat. 16B.67 and 14.50, 1986). The Notice of Hearing was proper in all respects. The Department has complied with all procedural and substantive provisions of law or rule.

2. The Appellants have failed to meet the requirements of U.B.C. 1712 in the Cub Foods retail supermarket.

3. The City of Rochester is not estopped from requiring the Appellants to implement corrective fire protection measures.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of the Department of Administration issue an Order upholding the violation issued by the City of Rochester which requires Appellants to implement appropriate corrective isures to comply with U.B.C. 1712.

Dated this day of June, 1987.

PETER C. ERICKSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail .

Reported: Transcript Prepared by Earl M. Steen and Associates.



# MEMORANDUM

The relevant portions of the Uniform Building Code read as follows:

## Foam Plastic Insulation

Sec. 1712. (a) General. The provisions of this section shall govern the requirements and uses of foam plastic in buildings and structures. For trim, see Section 1705(e).

Except where otherwise noted in this section, all foam plastics used in building construction shall have a flame-spread rating of not more than 75 and shall have a smoke-developed rating of not more than 450 when tested in the maximum thickness intended for use in accordance with U.B.C. Standard No. 42-1. All packages and containers of foam plastic ingredients shall bear the label of an approved agency showing either the flame-spread rating and smoke-developed rating of the product at the thickness tested or the use for which the product has been listed. The interior of the building shall be separated from the foam plastic by an approved thermal barrier having an index of 15 when tested over calcium silicate board in accordance with U.B.C. Standard No. 17-3. The thermal barrier shall be installed in such a manner that it will remain in place for the time of its index classification based upon approved diversified tests.

(b) Specific Requirements. Unless otherwise specifically approved as provided by Section 1712(c) or by other sections of this code, foam plastics may be used as follows;

1. Masonry or concrete construction. Foam plastics may be used without the thermal barrier described above, regardless of the type of construction, when the foam plastic is covered by a minimum of 1-inch thickness of masonry or concrete in a wall, floor or roof system,

2. Attics and crawl spaces. Within an attic or crawl space where entry is made only for service of utilities, foam plastics shall be protected against ignition by 1-1/2-inch-thick mineral fiber insulation, 1/4-inch-thick plywood, hardboard or gypsum wallboard, corrosion-resistant sheet metal having a base metal thickness not less than 0.0160 inch at any point, or other approved material installed in such a manner that the foam plastic is not exposed.

3. Cold storage construction. Foam plastic installed and meeting the requirements of (a) above when tested in a thickness of 4 inches may be used in a thickness up to 10 inches in cold storage buildings, ice plants, food-processing rooms and similar areas. For rooms within a building, the foam plastic shall be protected by a thermal barrier on both sides having an index of 15.

Foam plastic insulation may be used in freestanding coolers and freezers without the thermal barrier when the foam plastic has a flame-spread rating of 25 or less when tested in the thickness intended for use, is covered by not less than 0.032 inch of aluminum or corrosion-resistant steel having a base metal thickness not less than 0.0160 inch at any point and is protected by an automatic sprinkler system. When such a cooler or freezer is within a building, both the cooler or freezer and that part of the building in which the room is located shall be sprinkled.

As set forth above, Section 1712(a) states a general requirement that foam plastics shall be protected from fire hazard by the use of an approved thermal barrier. Specific requirements are set forth in paragraph (b) of that section regarding the use of foam plastic insulation in cold storage construction. "that provision requires that foam plastics either be protected by the use of a thermal barrier or that the 'part of the building in which the room is located shall be sprinkled.'" Subparagraph (b)2. provides for a specific exclusion of crawl spaces which would not require either a thermal barrier or sprinkling in the case herein.

The specific Code issues which have been litigated in this case are: (1) whether U.B.C. 1712(b)3. requires sprinkling on the top surface of the coolers as well as the surrounding area and interior; (2) whether the floor of the second story, located 22 inches above the top of the coolers, in conjunction with the gypsum board enclosure, constitutes a thermal barrier within the meaning of U.B.C. D DQG ZKHWKHU WKH VSDFH DERYH the coolers constitutes a "crawl space" within the meaning of U.B.C. 1712(b)2.

Appellants first argue that U.B.C. 1712(b)3. should not be read to require sprinkling on the top of the coolers as well as the surrounding area interior. That provision reads that "both the cooler or freezer and that part of the building in which the room is located shall be sprinkled." Appellants read the word "room" to mean the area of the building in which the cooler is located rather than meaning the cooler or freezer itself. The Judge agrees with that interpretation. The rule provision specifically states that "foam plastic insulation" must be "protected by an automatic sprinkler system." This provision must be read to require that all sides of the insulation panels, including the interior of the cooler room, must have sprinkler protection. Consequently, the Judge concludes that U.B.C. 1712(b)3. requires sprinkler protection on the top of the coolers herein.

Appellants next argue that the second story floor, which is only 22 inches above the top of the coolers, constitutes a thermal barrier within the meaning of 1712(a) in conjunction with the gypsum board enclosure. However, the

language in paragraph (a) can only be read to require that the thermal barrier first be attached to the foam plastic insulation material itself. This interpretation is supported by a discussion of the testing techniques contained in the 1976 analysis of revisions published by the ICBO which requires that the "15-minute thermal barrier be applied over the plastic material." Thus, the Judge has concluded that the second story floor "thermal Trier" does not fulfill the requirements contained in U.B.C 1712.

Next, Appellants argue that the space above the coolers constitutes a "crawl space" within the meaning of U.B.C. 1712(b)2. and thus, requires no fire protection either by use of a thermal barrier or sprinklering. The U.B.C. does not provide a definition of "crawl space" except to refer to it in paragraph (b)2. as an area "where entry is made only for service of utilities." A generally accepted definition of the term "crawl space" is a space between the ground and the first floor of a building which is surrounded by the building foundation wall. Tr. Vol. 2, p. 76, Appellants argue that the area in question above the coolers is not used for any purpose other than to "service" the utility lines running through the 22-inch space

Although the "crawl space" exception could be stretched to apply to the case herein, the Judge does not accept the resulting analysis that no fire protection is required. Section 103 of the U.B.C. states specifically that the most "restrictive" provision of the Code shall govern where requirements appear to conflict. In this case, paragraph (b)3. speaks specifically to the use of foam plastics in cold storage construction. Subparagraph 2, is a more general requirement for the use of foam plastics in "attics and crawl spaces". Thus, the more restrictive requirements contained in subparagraph 3, must apply herein.

Finally, the Appellants have argued that the City is estopped at this time from requiring the Appellants to implement corrective fire protection for the area in question. In order for estoppel against the City to apply, Appellants must prove that they relied in good faith on some act or omission made by the City and, because of such reliance, incurred a substantial change in position or extensive obligations and expenses. Further, the Appellants must show that the public's interest would not be unduly affected by enforcement of such estoppel. *City of Eden Prairie v. John-Lipke*, (decision of Minnesota Court of Appeals, April 3, 1987); *Ridgewood Development Co. v. State*, 294 N.W.2d 288 (Minn. 1980); *Mesaba Aviation v. County of Itasca*, 258 N.W.2d 877 (Minn, 1977). The Appellants have a heavy burden of proof. They must first show the City's wrongful conduct and then demonstrate that the equities proposed by the Appellants outweigh the public interest. *Ridgewood*, 294 N.W.2d 292; *Mesaba*, 258 N.W.2d at 880. See also, *Brown-v. Minnesota Dept. of Public Welfare*, 368 N.W.2d 906 (Minn. 1985).

In this case, the City did not make specific affirmative representations that the area in question satisfied applicable fire protection requirements. Instead, the Appellants argue that the City's general approval of the plans submitted through the permit process and the City's failure or omission in pointing out the need for corrective action until construction had been completed served as the representations upon which the Appellants relied. The Judge does not find this argument persuasive. The City's approval of the plans is qualified by a provision which holds the Appellants responsible for full compliance with applicable code requirements and specifically states that the City's approval is not construed as an affirmative approval of all compliance issues. The sprinkler subcontractor was further informed that approval of the system would not be final until after an on-site inspection. Thus, no representations or omissions were made by the City upon which the Appellants could attach an estoppel argument.

Further, even if such representations could be proven, the Appellants have failed to show that they have or would incur a detriment which would outweigh the public safety factors, that is, the risk to the public associated with the

use of the foam plastics in the supermarket inadequately protected by a thermal barrier or sprinklering system. The estimate of costs to be incurred by the Appellants in correcting this matter was approximately \$11,000. The total estimated cost of the construction project was \$1,000,000. This cost difference does not amount to a "substantial" expenditure as contemplated by the Ridgewood case such that it would be highly inequitable to require the appellants to take such action.

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